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No. 95-1467

In The

Supreme Court of the United States

October Term, 1995

THE PILLSBURY COMPANY, INC.,

Petitioner,

vs.

THE PORT OF CORPUS CHRISTI AUTHORITY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION OF PORT OF HOUSTON AUTHORITY FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN OPPOSITION TO PETITION, AND BRIEF AMICUS CURIAE

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The Port of Houston Authority hereby moves, pursuant to Rule 37.2, for leave to file a brief amicus curiae in opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. Respondent, The Port of Corpus Christi Authority, has consented to the filing of this brief, but Petitioner has declined to consent. Petitioner did not give any reason for the declined consent. A copy of the proposed amicus brief is attached.

As more fully explained at pages 2-3 of the attached brief under "Statement of Interest," the Port of Houston Authority was created under Article III, Section 52 of the Texas Constitution and was converted to a Navigation District operating under Article XVI, Section 59 of the Texas Constitution. The Port of Houston Authority owns and operates the public facilities along the Houston Ship Channel, and is the Channel's official sponsor. The Port of Houston Authority is the eighth largest port in the world, ranking first in the United States in foreign waterborne commerce and second in total tonnage. It plays a pivotal role in the Texas economy, permitting commerce and trade that imparts benefits throughout the state.

As a Navigation District under the Texas Constitution, the Port of Houston Authority is a creation of the Texas Legislature, and an agency of the State of Texas entitled to the protections of the Eleventh Amendment of the United States Constitution. Prior to Petitioner's appeals, both the Texas Supreme Court and the United States Court of Appeals for the Fifth Circuit had explicitly recognized this immunity. *Guillory v. Port of Houston Auth.*, 845 S.W.2d 812, 814 (Tex. 1993) (Navigation districts operating under Tex. Const. Art. XVI, Section 59 are entirely governmental in function and entitled to Eleventh Amendment immunity); *Kamani v. Port of Houston Auth.*, 702 F.2d 612 (5th Cir. 1983) (recognizing Eleventh Amendment immunity of the Port of Houston Authority).

The issue presented by this case is the denial of the Eleventh Amendment immunity to the Port of Corpus Christi, also a Navigation District created under Article XVI, Section 59 of the Texas Constitution. The Port of Houston Authority's particular interest in the present case arises out of a statement by the District Court directly bearing on the Port of Houston Authority. When the District Court below denied Eleventh Amendment immunity to the Port of Corpus Christi, the District Court opined that the Port of Houston Authority and the Port of Corpus Christi were "legally and factually indistinguishable."[1] By so commenting, the District Court challenged the Port of Houston Authority's well established Eleventh Amendment immunity and disregarded binding precedent. Thus, the outcome of this issue implicates the Port of Houston Authority's immunity from suit in federal court, previously recognized by the state's highest court, the state legislature, and the Fifth Circuit Court of Appeals. The Port of Houston Authority has a significant interest in defending the safeguards created by the Eleventh Amendment as they apply directly to the Port of Houston Authority, and as they apply to Navigation Districts in Texas generally.

This Court should permit the Port of Houston Authority to file its amicus brief for several reasons:

First, this case involves a constitutional issue of obvious significance. The Eleventh Amendment immunity issue implicates the sovereignty of port authorities created and existing under the Constitution of the State of Texas, and could affect the statewide benefits these port authorities generate. This case, therefore, is important to the State of Texas and its citizens. As a matter which broadly effects the public interest, this case is one in which the Court should consider arguments of parties in addition to the litigants.

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1. The Port of Houston Authority does not concede this point.

Second, the Port of Houston Authority is well positioned to address Eleventh Amendment immunity questions presented from the perspective of a legislatively created, single state, Navigation District. The Port of Houston Authority believes its brief will assist this Court, and will present arguments and authorities that Respondent's brief does not; among them are:

- an analysis and dismantling of the supposed "conflict" asserted by Petitioner in an effort to gain writ;

- an analysis of Texas legislation and jurisprudence regarding Texas port authorities; and

- an historical perspective justifying the Fifth Circuit's ruling in *Kamani, supra,* and in this case.

The Port of Houston Authority, as a result of the above-referenced comment by the District Court, is directly implicated by the decision of this Court on this issue. The Respondent, Port of Corpus Christi's brief is short. Thus, the total argument presented to the Court in considering certiorari is relatively modest in comparison with the importance of the issues presented.

For the foregoing reasons, it is respectfully requested that the Court grant leave to file the attached brief of the Port of Houston Authority as amicus curiae.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE PORT OF HOUSTON AUTHORITY IN OPPOSITION TO PETITION

The Port of Houston Authority submits this brief as amicus curiae in opposition to The Pillsbury Company's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

STATEMENT OF INTEREST

The Eleventh Amendment to the Constitution of the United States fulfills a vital role in our federal system of government by guaranteeing the dignity and sovereignty of the Several States. The Eleventh Amendment does so by prohibiting suits by individuals against the State or its agencies in federal court. This case presents the question of whether the Fifth Circuit properly analyzed the Port of Corpus Christi in the context of the Eleventh Amendment, and properly gave weight to (1) the Texas Legislature's intent to vest Texas' constitutional Navigation Districts with state agency status and thus Eleventh Amendment immunity; and (2) the opinions of Texas' highest court and the Fifth Circuit acknowledging the Eleventh Amendment immunity of similarly situated Navigation Districts. These issues directly implicate the sovereignty of the State of Texas, as well as the Port of Houston Authority's immunity from suit in federal court, previously acknowledged by the Texas Supreme Court and the United States Court of Appeals for the Fifth Circuit.

The federal District Court denied Eleventh Amendment immunity to the Port of Corpus Christi while commenting, in *dicta*, that the Port of Corpus Christi is "legally and factually indistinguishable from the Port of Houston Authority."[1] In so

1. The Port of Houston Authority does not concede this point. Factual assertions made by the Port of Corpus Christi and Pillsbury in this regard (Cont'd)

commenting, the District Court implicitly and explicitly challenged the Port of Houston Authority's Eleventh Amendment immunity as acknowledged by the Fifth Circuit in *Kamani v. Port of Houston Auth.*, 702 F.2d 612 (5th Cir. 1983).

Additionally, this Court's grant or denial of writ on this issue will give guidance to the Fifth Circuit on the arm-of-state doctrine as applied to single-state Navigation Districts created by the Constitution of the State of Texas. The Port of Houston Authority has a significant and substantial interest in defending the safeguards created by the Eleventh Amendment as they apply in this context. Because the Fifth Circuit panel below properly analyzed the Port of Corpus Christi in the context of the Eleventh Amendment, and properly gave deference to the intent of the state legislature and the applicable case law from the Texas Supreme Court, the Port of Houston Authority has a substantial interest in seeing that the Fifth Circuit's analysis is approved by this Honorable Court.

ARGUMENT

Petitioner has failed to demonstrate that the Fifth Circuit Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter, or in conflict with applicable decisions of the Supreme Court. In an effort to gain an audience with this Honorable Court, Petitioner has characterized the issue as one of whether this Court's analysis in *Hess v. Port Auth. Trans-Hudson Corp.*, 513

(Cont'd)

reflect solely their positions. The issue, in any event, should have no bearing in this case, since the Texas Supreme Court has distinguished all Navigation Districts operating under Article XVI, Section 59 of the Texas Constitution from municipalities and counties, holding that the former are "entirely governmental" in function and are entitled to Eleventh Amendment immunity. *Guillory v. Port of Houston Auth.*, 845 S.W. 2d 812, 814 (Tex. 1993).

U.S. __, 115 S. Ct. 394 (1994), applies to single-state entities. A ruling on that issue would not affect the outcome of the Fifth Circuit's analysis below, since the Fifth Circuit has acknowledged the multi-factored Eleventh Amendment immunity analysis espoused in *Hess*. The result below also comports with this Court's teachings in *Hess* regarding the unique characteristics of a bi-state, Compact Clause entity in the context of the Eleventh Amendment. Since the Fourth Circuit undertakes the same analysis, the result below does not create an inter-circuit conflict.

It is Petitioner's misreading of *Hess*, and the attempt to apply it to a single-state entity, that has generated the "conflicts" Petitioner asserts. Petitioner has incorrectly read *Hess* to mean that a single-state entity cannot enjoy Eleventh Amendment immunity if a judgment against it would not be paid from the state's treasury. (Petitioner's brief at p. 5.) Hess does not stand for this proposition. In *Seminole Tribe of Florida v. Florida, et al.*,__ U.S. __,1996 WL 134309 (U.S.), this Court found that "The Eleventh Amendment does not exist solely in order to prevent federal court judgments that must be paid out of a State's treasury; it also serves to avoid the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties." (Citations and internal quotation marks omitted.)

I.

THE FIFTH CIRCUIT'S OPINION BELOW DOES NOT CONFLICT WITH *HESS* OR THE FOURTH CIRCUIT'S ANALYSIS.

A. The Decision Below Does Not Conflict With *Hess*.

1. The Decision Below Acknowledged Hess Criteria.

The Fifth Circuit panel below properly found that it was bound by its earlier decision in *Kamani v. Port of Houston Auth.*, 702 F.2d 612 (5th Cir. 1983), wherein the Fifth Circuit ruled that the Port of Houston Authority was entitled to Eleventh Amendment immunity. This result followed from the District Court's comment that the Port of Houston Authority and the Port of Corpus Christi were legally and factually indistinguishable. However, the court below did find that an application of the Eleventh Amendment criteria set out by the Fifth Circuit in *Jacintoport v. Greater Baton Rouge Port Commission*, 762 F.2d 435 (5th Cir. 1985) *would* result in a finding that the Port of Corpus Christi was entitled to Eleventh Amended immunity. *Pillsbury Co. v. Port of Corpus Christi Auth.*, 66 F.3d 103, 105 n. 5 (5th Cir. 1995).

In its opinion below, the Fifth Circuit found that an application of the "six-part test" from *Jacintoport, supra,* would lead to the conclusion that the Port of Corpus Christi is entitled to Eleventh Amendment immunity. That six-part test involves the following factors: (1) how the entity is treated by state courts; (2) whether a judgment would be satisfied by the entity's funds or by state appropriations; (3) the entity's degree of local autonomy; (4) whether the agency has express authority to sue and be sued in its corporate name; (5) whether the agency has been granted the right to hold and use property; and (6) whether

the agency is primarily concerned with local, as opposed to statewide, problems. *Jacintoport, supra,* 762 F.2d at 438-442. These criteria largely encompass the same criteria acknowledged by this Court in *Hess.*

In *Hess,* this Court recognized and retained the factors that had been identified as relevant in the Eleventh Amendment arm-of-state analysis in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391, 401 (1979). The *Hess* opinions directly addressed several of these other "indicators of immunity," *Hess, supra,* 513 U.S. at __, 115 S. Ct. at 402-404. These factors are essentially the same as those enumerated in *Jacintoport, supra.* In fact, the *Jacintoport* opinion also relied upon this Court's discussion of Eleventh Amendment immunity in *Lake Country Estates, supra. Jacintoport,* 762 F.2d at 437. Thus, to the extent this Court chooses to review the opinion below, this Court will not be deciding whether the *Hess* opinion applies to single-state entities; it will be re-analyzing the acknowledged Eleventh Amendment criteria against the Port of Corpus Christi's operating structure and the legislative and judicial pronouncements relevant to the Port's status as an arm of the State of Texas.

2. The Decision Below Does Not Unduly Constrain Hess.

The *Hess* opinion, handed down by this Court in November of 1994, involved a bi-state railway, the Port Authority Trans-Hudson Corp. ("PATH"). As Justice Ginsberg's opinion pointed out, PATH was created by federal congressional consent, pursuant to the United States Constitution's Interstate Compact Clause. Noting that such a bi-state entity is a creation of both the states and the federal governmental, the *Hess* opinion acknowledges that such an entity occupies "a significantly different position in our federal system than do the states themselves." 513 U.S. at __, 115 S. Ct. at 400. Acknowledging

that a state's *dignity*, as well as its treasury, are the intended beneficiaries of Eleventh Amendment immunity, the Court in *Hess* opined:

> Suit in federal court is not an affront to the dignity of a Compact Clause entity, for the federal court, in relation to such an enterprise, is hardly the instrument of a distant, disconnected sovereign; rather, the federal court is ordained by one of the entities' founders. Nor is the integrity of the compacting states compromised when the Compact Clause entity is sued in federal court. . . . [T]he federal tribunal cannot be regarded as alien in this cooperative, tri-governmental arrangement.

513 U.S. at __, 115 S. Ct. at 401.

In view of these comments in the *Hess* opinion, the Fifth Circuit below properly undertook an analysis that would give weight to the dignity of the State of Texas as well as to the other Eleventh Amendment factors taken into consideration in *Hess*. The Fifth Circuit below can be fairly said to have (1) properly acknowledged that they were constrained by *stare decisis* with respect to the *Kamani* opinion; and (2) alteratively applied the *Hess* criteria (to the extent the analysis can be applied to a single-state entity) under the guise of *Jacintoport* criteria and concluded that such a multi-factored analysis would still result in a finding of Eleventh Amendment immunity.

3. *The Decision Below Conforms to the Historical Rationales for the Eleventh Amendment.*

As this Court noted in *Hess*, there are two concerns driving the Eleventh Amendment — the state's solvency and the state's

dignity. 513 U.S. at __, 115 S. Ct. at 406. *Hess* does not stand for the proposition (as Petitioner asserts) that the Eleventh Amendment immunity analysis for single-state entities has been narrowed to one issue: whether a judgment against the entity would be paid out of the state treasury. Rather, the *Hess* opinion acknowledged that the "dignity" concern, and the factors relevant to that concern, are consigned to a role of lesser prominence with a bi-state entity, leaving the "solvency" concern as the primary focus.

Where a single-state entity is concerned, as in the court below, the "dignity" concern is still valid. Both the history of the Eleventh Amendment and this Court's teachings on the issue reveal that the result in the Fifth Circuit below properly evidenced a degree of deference to the "dignity" concern.

The historical evolution of the Eleventh Amendment mandates such deference. When the Constitution faced ratification at the state conventions, there was heated debate over whether the states could be sued in federal court without their consent. In Virginia, George Mason vehemently opposed ratification of the Constitution if Article III would make the states subject to suit in federal court:

> Claims respecting those lands, every liquidated account, or other claim against this state, will be tried before the federal court. Is this not disgraceful? Is this state to be brought to the bar of justice like a delinquent individual? Is the sovereignty of the state to be arraigned like a culprit, or private offender?

See Atascadero State Hospital v. Scanlon, 473 U.S. 234, 265 (1985) (Brennan J. dissenting), *quoting* 3 J. Elliott, *Debates on*

the Federal Constitution, 526-527 (1891). The founding fathers also voiced grave concern that sovereign immunity as a defense to enforcement of *substantive* state law claims would be unavailable in federal court. *Id.* These fears were allayed to some degree in debate, but the drafters did not explicitly resolve the issue in the text of the Constitution.[2]

Despite the implication during debate that Article III would not permit a private action against the states, the Supreme Court handed down its opinion in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), ruling that the State of Georgia was subject to suit in federal court in an action brought by an individual to recover money owed by the state to an individual. The *Chisholm* opinion caused such outrage that the State of Georgia adopted a statute threatening that anyone who attempted to enforce the decision would be declared guilty of a felony and would suffer death by hanging without the benefit of clergy. This intense reaction to the *Chisholm* opinion inspired Congress to draft and approve the Eleventh Amendment within three weeks, insulating the integrity of the states as originally intended by the Constitution's drafters. *See* P. Lowe and J. Jeffries, *Federal Courts and the Law of Federal State Relations*, pp. 100-101 (1987).

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2. The drafters may have seen no need to do so. In debating the powers of the federal judiciary under the Constitution, James Madison appeased the concerns of Alexander Hamilton, George Mason, and Patrick Henry by giving Article III limited application. Madison said, "It's jurisdiction [the federal jurisdiction] in controversies between a state and citizens of another state is much objected to, and perhaps without reason. *It is not in the power of individuals to call any state into court.* The only operation it can have is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court." *See Hans v. Louisiana*, 134 U.S. 1, 14 (1890) (*quoting* 3 Elliott's *Debates* 533 (2d Ed.) (emphasis added).

4. The Decision Below is Supported by Texas' Treatment of Constitutional Port Authorities.

Given the historical underpinnings of the Eleventh Amendment, the Fifth Circuit below properly acknowledged the Port of Corpus Christi's Eleventh Amendment immunity, especially in view of the pronouncements by the Texas Legislature and Texas Supreme Court relevant to the issue. In 1917, Article XVI, Section 59 was added to the Texas Constitution in recognition of the state's interest in promoting commerce and in enacting legislation for the development of navigation of the state's inland and coastal waters. The Nueces County Navigation District (now the Port of Corpus Christi) was created to fulfill the goals of this constitutional provision.

The Texas Legislature defined such navigation districts as a "Governmental Unit" of Texas, and cloaked them with sovereign immunity, except to the extent of a limited waiver found in the Texas Tort Claims Act, Tex. Civ. Prac. & Rem. Code § 101.023. This legislative waiver was made subject to several explicit conditions, the most important of which is that "the state's sovereign immunity under the Eleventh Amendment to the United States Constitution is not waived; and . . . the state does not grant permission to be sued in any federal court." Tex. Civ. Prac. & Rem. Code § 107.002(a)(11), (12). The Texas Legislature further provided that "any suit brought under this chapter [the limited waiver of liability under the Texas Tort Claims Act] *shall* be brought in *state court* in the county in which the cause of action or a part of the cause of action arises." Tex. Civ. Prac. & Rem. Code § 101.102(a) (emphasis added). This legislative pronouncement gives specific, procedural protections to Texas' constitutional port authorities that the federal courts should not simply disregard.

In addition to this legislative history, the Texas Supreme Court has acknowledged this history and held that

constitutionally authorized, state-created navigation districts are "different" from those other political entities such as counties and municipalities that are not entitled to Eleventh Amendment immunity. *Guillory v. Port of Houston Auth.*, 845 S.W. 2d 812, 814 (Tex. 1993). When state legislation is interpreted and upheld by the highest court of the state, this must be taken as an expression of state policy. *Angel v. Bullington*, 330 U.S. 183, 191 (1947). Thus, navigation districts such as the Port of Corpus Christi fall within the traditionally protected class of state agencies under the Eleventh Amendment, even if the state's treasury were not immediately jeopardized by a judgment.[3]

B. The Decision Below Does Not Conflict With the Fourth Circuit Precedent.

Petitioner incorrectly asserts that the Fourth Circuit's opinions in *Gray v. Laws*, 51 F.3d 426 (4th Cir. 1995), and *Ristow v. South Carolina Ports Auth.*, 58 F.3d 1051 (4th Cir. 1995), are in conflict with the Fifth Circuit's opinion below. As discussed above, the Fifth Circuit below properly acknowledged its prior analysis in *Jacintoport*, which gives more weight to the "dignity factor" in the case of a single-state entity than this Court gave in *Hess* for a bi-state Compact Clause Entity. The Fifth Circuit specifically acknowledged the six-factor test in *Jacintoport* (the same factors analyzed in *Hess* and *Lake Country Estates, supra*), leading to the conclusion that, for single-state entities, the Fifth Circuit followed the multi-factored analysis found in *Hess*, but gave some of the factors different weight. As the *Hess* opinion itself acknowledges, this is appropriate because the analysis of

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3. Although the Texas Constitution's provisions creating these port authorities provided a mechanism to fund the governmental function of operation public port facilities without direct call on the state treasury, the State of Texas would have no choice but to permit access to state funds if financial difficulties were to threaten these keystones to state commerce.

a bi-state, Compact Clause entity differs from that applied to a single-state entity.

Similarly, the Fourth Circuit has acknowledged the *Hess* opinion and has applied the *Hess* factors in the *Gray* and *Ristow* opinions, but has not undertaken an analysis identical to that of this Court in *Hess* because no bi-state entity was involved. In *Gray v. Laws, supra,* the Fourth Circuit acknowledged that "the [*Hess*] Court's Eleventh Amendment analysis was driven in large part by the 'significantly different position in our federal system' that multi-state entities occupy from the states." 51 F.3d at 431, *citing Hess,* 513 U.S. at __, 115 S. Ct. at 400. While the Fourth Circuit in *Gray* acknowledged that "the same broad principles" utilized by this Court in *Hess* would be relevant to a single-state entity, the Fourth Circuit also made it clear that the *Hess* opinion *retained* factors such as the state's characterization of the entity and the entity's functions as "relevant to the Eleventh Amendment inquiry." 51 F.3d at 432. The Fourth Circuit, in *Gray,* explicitly pointed out differences between the multi-state and single-state analyses in the wake of *Hess*:

> The principle differences between multi-state and single-state analyses appear to be that, in the former but not the latter, a presumption against Eleventh Amendment immunity exists [citations omitted], there is no threat to the integrity and dignity of the state [citations omitted] and the extent of state control over the entity is deemed to be such a 'perilous inquiry' as to be largely irrelevant.

51 F.3d at 433.

Similarly, in *Ristow,* the Fourth Circuit gave special emphasis to the treasury factor (*citing Hess*) in an effort to

preserve the Eleventh Amendment immunity of the South Carolina Ports Authority. However, as the court pointed out in *Gray*, the treasury factor on its own cannot be used to *deny* Eleventh Amendment immunity to a state agency:

> If, on the other hand, the state's treasury will *not* be effected by a judgment in the action, then the availability of immunity for single-state entities, as opposed to multi-state entities, must be determined by resort to the other relevant considerations referenced by the court, chief among which are whether suit will jeopardize 'the integrity retained by [the] state in our federal system.'

51 F.3d at 434 (emphasis added) (*citing Hess*, 513 U.S. at __, 115 S. Ct. at 400). Thus, the Fourth Circuit does *not* treat the treasury factor alone as dispositive where the treasury factor is being used to *deprive* a governmental agency of Eleventh Amendment immunity. There is no inconsistency between the Fifth and Fourth Circuits in this analysis.

As demonstrated above, the Fifth and Fourth Circuits undertake the same Eleventh Amendment immunity analysis. However, even if there were a conflict, it would not result in "forum shopping" as Petitioner asserts. This assertion suggests that the Petitioner's *substantive* legal remedies would somehow change if they were in state, versus federal, court. However, where a federal district court has exercised diversity jurisdiction, as in this case, the court is bound to recognize the rights, remedies, and protections afforded to the parties under state law. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); *Angel v. Bullington, supra*, 330 U.S. at 192 (finding that federal district court could not entertain a cause of action barred by state law); *Woods v. Interstate Realty Co.*, 337 U.S. 535, 538 (1949) (where

federal court is sitting in diversity jurisdiction, it is in effect only another court of the state, and if remedy would be barred in state court, it should likewise be barred in federal court). Thus, a given circuit's Eleventh Amendment immunity analysis would not induce forum shopping, since the plaintiff's remedies remain unchanged. If a federal forum *did* create a remedy for petitioner that the state courts would deny, this would trigger the federalism concerns that mandate deference to the state courts' characterization of the entity. A rule that would permit a federal court to ignore legal protections vested by the Texas Legislature would inundate federal courts with causes of action against counties and municipalities that would be unenforceable or have limited damages in state court. Such a rule would also discriminate against citizens of the state who, by happenstance, could not invoke diversity jurisdiction. *See Woods, supra,* 337 U.S. at 1237.

C. The Decision Below Is Consistent With Other Circuits.

The Petitioner asserts that the Second, Third, Seventh, and Eighth Circuits have implicitly agreed with the Fourth Circuit, citing *Hess* as authoritative in the context of single- state entities. [Petitioner's brief at p. 12.] The cases cited by Petitioner, however, do not demonstrate any conflict between the Fifth Circuit and the other circuits. Petitioner cites *Marbley v. Bane,* 57 F.3d 224, 233 (2nd Cir. 1995). This case involved a situation where the Second Circuit focused on the treasury factor (*citing Hess*) to *support* a finding of Eleventh Amendment immunity for the New York Department of Social Services. Similarly, the case cited by Petitioner from the Eighth Circuit involved an analysis giving weight to the treasury factor to *support* Eleventh Amendment immunity for the state agencies involved. *Thomas v. FAG Bearings Corp.,* 50 F.3d 502, 506 (8th Cir. 1995). In the Seventh Circuit case cited by Petitioner, *Matter of Merchants Grain, Inc.,* 59 F.3d 630, 632-633 (7th Cir. 1995), the court found

that, even though the entity's funding did *not* come from the state treasury, the entity *was* entitled to Eleventh Amendment immunity. Finally, Petitioner cites the Third Circuit's opinion in *Christy v. Pennsylvania Turnpike Commission,* 54 F.3d 1140, 1145. In that case, the Third Circuit undertook an analysis of several factors, and cited the *Hess* opinion, but did not give the same deference to the treasury factor that the *Hess* Court did in the context of the bi-state, Compact Clause Entity. Accordingly, the Fifth Circuit is not in conflict with these other circuits. The Fifth Circuit simply has not addressed a bi-state Compact Clause Entity. The Fifth Circuit's analysis is entirely consistent with *Hess* insofar as *Hess* can be applied to single- state entities.

In sum, the Petitioner offers no valid ground for granting writ of certiorari. There is no conflict between the circuits in their analysis with respect to the rights of a governmental entity to Eleventh Amendment immunity, whether that entity is a bi-state entity created under the Constitution's Compact Clause, or a single-state entity created by a state's constitution or legislation. Nor does the Fifth Circuit's decision below conflict with the state court of last resort; in fact, the Fifth Circuit's opinion is *in agreement* with the Texas Supreme Court's opinion in *Guillory v. The Port of Houston Auth., supra,* acknowledging the Eleventh Amendment immunity of the Port of Houston Authority.

Under the circumstances of this case, where the asserted error truly consists of an allegation that the Fifth Circuit below made erroneous factual findings or misapplied a properly stated rule of law, certiorari should not be granted.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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